DR ISMAIL ABDUL HAMID & ANOR A

v.

DR MOHD KHAIRY YAKUB & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
SITI KHADIJAH S HASSAN BADJENID JC
[SUIT NO: S-22-7-2007]
4 SEPTEMBER 2012

PROFESSIONS: *Medical practitioners - Removal from Register of Medical Practitioners - Whether conspiracy to injure - Whether agreement to conspire to injure proven* C

TORT: *Conspiracy - Agreement to act in concert - Plaintiffs medical doctors registered with Malaysian Medical Council ('MMC') - Removal from medical profession - Whether agreement to conspire to injure proven - Whether objects and means of conspiracy to injure sufficiently pleaded* D

A cardio-thoracic surgeon ('the first plaintiff') and his wife, an anaesthetist ('the second plaintif'), formed a company, Andalas Medical Centre Sdn Bhd ('AMC'). Both are medical doctors E registered with and licensed by the fourth defendant, the Malaysian Medical Council ('MMC'). The plaintiffs claimed that they were successful until bureaucratic manipulations caused them professional hardship and misery. The plaintiffs submitted evidence to show that the first, second and third defendants had collectively F conspired to injure the plaintiffs by manipulating MMC to remove them from the medical profession as doctors. The plaintiffs alleged that the Rector of Institute Technology Mara ('ITM') complained that MMC was pushing ITM to drop the program in which ITM collaborated with AMC. The said program was subsequently G cancelled and the doctors recruited from India had to repatriate. The plaintiffs then suffered further obstacles whereby (i) they were unable to continue their business for six months by reason of AMC's account being frozen; (ii) the first plaintiff was charged at the Klang Sessions Court for operating a radiology machine H without a license; and (iii) three complaints were lodged against the plaintiffs alleging misconduct giving rise to separate inquiries conducted against them. As a result, the plaintiffs claimed that they suffered incredible financial losses and sought damages and injunction against MMC from continuing with the disciplinary I

inquiries. Hence, the issues that arose for the court's determination *inter alia*, were: (i) whether there was conspiracy by the defendants to injure the profession of the plaintiffs; (ii) whether the plaintiffs had pleaded sufficiently in a case of this nature; (iii) whether the plaintiffs were allowed to claim that the entire proceedings before the Preliminary Investigation Committee ('PIC') connected to the complaints against them be declared null and void.

Held (dismissing plaintiffs' claim with no order as to costs):

(1) MMC is empowered by the Medical Act 1971 and the Medical Regulations 1974 to commence disciplinary inquiries into complaints made against any medical practitioner registered with it. There was no proof to show that the Ministry of Health ('MOH') had consulted MMC or that MOH had acted in concert with MMC when they raided AMC or when the first plaintiff was charged at the Klang court.

(2) The calling of the third defendant as a witness that represented MMC to prove that the first plaintiff was a registered doctor with MMC was not sufficient to show that MMC was acting in collision with MOH in a conspiracy to injure the plaintiffs. It was normal procedure in a prosecution. It was also clear from the evidence that the first, third and fourth defendants were not involved in the approval process of the licence of the plaintiff. Instead, the non-issuance of the licence by the second defendant was attributed to the plaintiffs' failure to meet the requirements under the Atomic Energy Licensing Act 1984.

(3) Section 103 of the Evidence Act 1950 provided that he who alleges must prove the allegation. Hence, it was incumbent upon the first plaintiff to produce the Rector of ITM to testify as to the truth of the allegation that MMC was pressuring ITM to drop their program which was channelled through the first defendant at meetings held by MMC. However, the plaintiff had failed to comply with the requirement of s. 103 of the Evidence Act 1950. (para 20)

(4) The plaintiffs had failed to provide direct evidence sufficient to prove that there was an agreement by the defendants to conspire to injure them. There was nothing to support the inference that there was any agreement in any form between

the defendants or any two of them with the common intention of unlawfully interfering with and causing damage to the plaintiffs' medical practice, whether by way of inquiries, the raid or even the Klang court matter. (para 21)

(5) The plaintiffs had failed to show that the defendants were working together in an agreement committing an unlawful act by lawful means, or even by unlawful means in furtherance of a conspiracy. In the circumstances, it was premature for the plaintiffs to ask for a declaration that the proceeding before the PIC pertaining to the complaints against them be declared null and void. (paras 22 & 24)

(6) It is trite that pleadings should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy and the injury and damage occasioned to the plaintiff thereby. On the facts, the plaintiffs had failed to plead sufficiently and with clarity the particular facts of the agreement by the defendants to conspire to injure the plaintiffs. (para 23)

Case(s) referred to:

Hussain Umar v. Dalip Singhji AIR (57) 1970 SC 45 ***(refd)***

SV Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd [2008] 4 CLJ 20 CA ***(refd)***

Quill Construction Sdn Bhd v. Tan Hor Teng & Anor [2006] 2 CLJ 358 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 103

Medical Act 1971, ss. 30, 31

Medical Regulations 1974, regs. 26, 27, 28, 29(3), (4)(b), 31

Other source(s) referred to:

Bullen & Leake & Jacobs on 'Precedents of Pleadings', 13th edn, p 221

For the plaintiffs - SN Sakthy Vell; M/s Arnold Andrew & Co

For the 1st, 3rd & 4th defendants - Yau Her Lerk (Rozanahah Juisin with him); M/s Shahrizat Rashid & Lee

For the 2nd defendant - Habibah Haron (Kasturi Arumugam with her); SFCs

Reported by Shah Saharudin

A

JUDGMENT

Siti Khadijah S Hassan Badjenid JC:

[1] The 1st and 2nd plaintiffs (Dr Mohd Ismail bin Abdul Hamid and his spouse Dr Marzida binti Mansor) are medical doctors registered with and licensed by the Malaysian Medical Council (hereinafter referred to as MMC). The 1st and 3rd defendants (Dr Mohd Khairy bin Yakub and Dr Karen Sharmini Sandasamy) are also medical doctors attached to the Ministry of Health (hereinafter referred to as MOH) who were the secretary and assistant secretary of the 4th defendant respectively. The 4th defendant ie, MMC is the regulatory body established by statute under the purview of the Medical Act 1971. The 2nd defendant (Peter Lee), an ex-radiographer from the General Hospital Kuala Lumpur was an officer in the licensing division of the Ministry of Health (hereinafter referred to as MOH) and at all material time was acting as the Deputy Director of the Engineering Division of MOH. At the trial both the plaintiffs appeared as witnesses for the plaintiffs namely PW1 and PW2. The 1st, 3rd and 4th defendants produced three witnesses namely the 1st (DW1-D1, D3, D4) and 3rd (DW3-D1, D3, D4) defendants themselves together with one Dr Wan Mazlan bin Mohd Woojdy (DW2-D1, D3, D4). The 2nd defendant himself appeared as 2nd defendant's only witness as DW1-D2.

Facts Of Case

[2] The 1st plaintiff is a cardio-thoracic surgeon while his wife, the 2nd plaintiff, is an anaesthetist. At the material time they formed a company called Andalas Medical Centre Sdn Bhd which operated as Andalas Medical Centre at Andalas, Klang (hereinafter called AMC) and was managed by and controlled by AMC Sdn Bhd whose two directors were the plaintiffs. According to the plaintiffs they were successful until the time when bureaucratic manipulations had caused them professional hardship and misery. They adduced evidence to show how the 1st, 2nd and 3rd defendants had collectively conspired to injure them by manipulating the 4th defendant to oust them from the medical profession as doctors.

[3] According to the pleadings and facts as enumerated by the plaintiffs at that point in time when Institute Technology Mara, (ITM) had set up a nursing school AMC gave out scholarships to

13 of its nurses. As ITM did not have sufficiently adequate qualified lecturers the nurses were poorly trained and 12 of the scholarship holders failed in the finals. Following this the Dean of ITM had asked the plaintiffs to help to which the plaintiffs responded positively. In an agreement between them the arrangement was for ITM to recruit medical specialists from India whose salaries would be paid by the plaintiffs who would also be responsible in the purchase of all necessary equipments. All other aspects of the said specialists' entry into Malaysia namely immigration matters and the necessary procedures regarding registration of the said specialists with the MMC were to be attended to by ITM.

[4] The recruited specialists then arrived and were helping the ITM students and setting up their various departments at AMC. At the same time plaintiffs were chasing ITM to obtain the necessary registration of the specialists with the 4th defendant. Everything was working fine until the Rector of ITM called the 1st plaintiff and complained that the 4th defendant was pressurising ITM to drop the said program. The plaintiffs claim problems started due to pressure from MMC through the 1st defendant who represented the 4th defendant at meetings held by MMC. According to the plaintiffs the 1st defendant had said the agreement between ITM and AMC cannot be allowed to continue. Ultimately the said program had to be called off and the doctors repatriated. The plaintiffs claim as a result of what happened they suffered tremendous financial loss and hardship and it was at this time that Bank Pembangunan who financed the setting up of AMC sent receivers and managers (Wong & Associates) to take over AMC.

[5] According to the plaintiffs, after two months, the receivers and managers abruptly withdrew, leaving the plaintiffs in the lurch for the next six months unable to carry on business since all of AMC's accounts had been frozen *in lieu* of the appointment of the receivers and managers. It was more than a year later, with the consent of the bank that a company called Takzim Ikhlas Sdn Bhd was formed and ran AMC. However an unsecured creditor managed to wind-up AMC Sdn Bhd and the plaintiffs claim it was during this time that officers from MOH raided AMC's radiology department. According to the plaintiffs this was attributed to by the inefficiency of the receivers and managers who did not know

how to manage a hospital in receivership. The 1st plaintiff was then charged at the Klang Sessions Court for operating a radiology machine without a license. It was during the appearance in court for this matter that the 2nd defendant had advised the 1st plaintiff to plead guilty. Only for the timely advice of his counsel that the 1st plaintiff retracted his plea, the case proceeded to trial and the plaintiff was later found not guilty, acquitted and discharged.

[6] Apart from these, there were three complaints against the 1st and 2nd plaintiffs, each of the complaint alleging misconduct leading to three separate inquiries being conducted against them by MMC. As regards the first complaint against the 2nd plaintiff it is a mandatory requirement to enable admission for a post graduate training for a doctor to obtain a Certificate of Good Standing (CGS) to be issued by MMC but when 2nd plaintiff reapplied for another CGS after the first one expired she was told by MMC that since there was a complaint against her MMC could not issue the certificate until investigations completed. It was only on 22 September 2005 that the said letter of the first complaint dated 10 February 2001 was faxed to the plaintiffs' clinic and the inquiry was fixed for hearing on the next day which later and only on request made by the plaintiffs was it adjourned to 18 November 2005. The 1st defendant admitted in his evidence that it took almost four years to notify the plaintiffs and to form a Preliminary Investigation Committee (PIC) to enquire into the matter. As the complainant failed to turn up on the date of hearing of the inquiry, pursuant to reg. 29(3) of the Medical Regulations 1974 the matter could not proceed further. It is to be noted that there is no documents in the court file to show that the decision of the 4th defendant had been communicated to the plaintiffs, not until the filing of this action by a letter dated 22 January 2007.

[7] As to the second complaint according to the 1st plaintiff though the medical needs of the complainant was attended to by a locum at AMC ie, by an orthopaedic surgeon by the name of Sham, the 1st plaintiff, following the surgeon's order in the post-operative notes only removed the screws that fixed the complainant's fracture which could be done by any doctor. Later the complainant's application to be medically boarded out was

dismissed on the grounds that he was completely fit, had no handicap and fit to return to work. However Dr Lim Boon Ping, an orthopaedic surgeon at the SJMC who saw him later concluded that the patient's leg had been fused in an 'L' shape. Based on this view the complainant had complained to MMC that the 1st plaintiff who was not an orthopaedic surgeon had performed the operation and fixed the complainant's ankle. On this complaint the 1st plaintiff takes objection that he was charged pursuant to reg. 29(4)(b) of the Medical Regulations 1974 without taking Dr Lim Boon Ping's evidence to support the allegations but was solely based on the second complainant's evidence. This court observes that the inquiry for this matter is still pending and have not been completed at the PIC stage.

[8] The third complaint was by the Consumers' Association of Penang to MOH that AMC in Klang had been operating illegally for the period of two years and requested the Minister to look into the matter. Once again the 2nd defendant organised a raid at AMC where a Burmese Dr Than Lin was arrested and charged. On his plea of guilty Dr Than was sentenced and later deported. According to the 1st plaintiff though this complaint was related to the employment of the Burmese doctor at the hospital, the hospital was then in receivership and despite not mentioning the plaintiff's name the 1st plaintiff was called to face the charge. It is the plaintiffs' case that they had nothing to do with Takzim Ikhlas Sdn Bhd and had never been the directors or owner of this company at anytime whatsoever.

[9] On the above matter, defence witnesses admitted that Dr Than Lin was employed by Takzim Ikhlas Sdn Bhd (marked P6 by PIC). The 1st plaintiff also gave evidence that he and his wife ceased to be directors of AMC Sdn Bhd with effect from 10 May 2001. On this point the 1st plaintiff submits that there was nothing concrete before PIC to establish that AMC was under the control and care of the 1st plaintiff at the material time. Apart from these the plaintiff raises many other issues pertaining to non-compliance of the Medical Act 1971 and Medical Regulations 1974 by PIC and claims that the hearings conducted were unfair and ought to be declared null and void. The plaintiffs submit that none of the complaints could stick in particular the third complaint. It is however noted by this court that to date the third complaint is also pending and have not been completed at the PIC stage.

[10] According to the plaintiffs the constant harassment by the defendants had prompted him to sell his clinic and joined University of Malaya as a senior lecturer. In 2006 hardly a month after his appointment by the Public Services Commission as a consultant cardiac surgeon at Kuching General Hospital the 1st plaintiff was transferred out from the Cardiac Thoracic Unit to General Surgery. The 1st plaintiff also informs the court that on his application for an APC specifically stating his principal place of practice at Klinik Mutiara, 40A Jalan Senurai, Taman Desa Utama, Klang 41200, Selangor together with the required fee, he was however issued an APC with the address of practice deliberately wrongly stated and the receipt accompanying it issued in the name of one Narjit Singh & Dhaliwal and the Form 11 that the 1st plaintiff had filled up and sent to the 4th defendant bearing the correct place of practice was returned with a hand written note that "APC sudah dihantar 1021/06 Andalas Medical Centre".

[11] The plaintiffs claim that, as a result of all these, they have suffered losses. They are seeking damages, and also injunction against MMC from continuing the disciplinary inquiries until the disposal of this action. The defendants have denied all the allegations against them. According to the 1st, 3rd and 4th defendants, upon receiving complaints against any medical doctors registered with the 4th defendant, a preliminary investigation inquiry would be carried out. This is carried out by the PIC pursuant to regs. 26 to 29 of the Medical Regulations 1974. After the PIC has conducted its investigations, the PIC can recommend to the Council itself (4th defendant) to hold an inquiry pursuant to reg. 29 of the Medical Regulations 1974. In the event the PIC recommends for an inquiry to be held, the council has to do so according to reg. 31 of the Medical Regulations 1974. The council would then hear the matter and if the doctor is found guilty of the offence charged the Council is able to impose the appropriate punishment pursuant to s. 30 of the Medical Act 1971.

[12] According to the 1st, 3rd and 4th defendants, the inquiry for the first complaint against the two plaintiffs had been withdrawn due to the complainant's absence and the plaintiffs have been informed (though denied by the plaintiffs) that the 4th defendant will recommend not to proceed any further against both plaintiffs on the first charge. The other two inquiries by the PIC relating to the second and third complaints are still ongoing and pending.

The 2nd defendant's defence is that he was at all material time acting under a lawful duty as the Deputy Director of the Engineering Division of MOH and his duty was to enforce the Atomic Energy Licensing Act 1984 *via* licensing, examination process and enforcement activities. According to the 2nd defendant the failure of the 1st plaintiff to adhere to the requirement of the law was the primary and the only cause on the non-issuance of the licence to the plaintiff.

[13] Issues Before The Court

(i) Whether there was a conspiracy by the defendants to injure the profession of the plaintiffs;

(ii) whether the plaintiffs have pleaded sufficiently in a case of this nature; and

(iii) whether the court should allow the plaintiffs' claim that the entire proceeding before the PIC of the 4th defendant pertaining to the three complaints against them be declared null and void for failure to adhere to the Medical Regulations 1974.

The Court's Findings

Whether There Was A Conspiracy To Injure The Profession Of The Two Doctors ie, The Plaintiffs

[14] In *Hussain Umar v. Dalip Singhji* AIR (57) 1970 SC 45 the Indian Supreme Court explains the offence of conspiracy as follows:

> The agreement is the gist of the offence. In order to constitute a general conspiracy there must be common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secret or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish a common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for the advancement

of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different group of person co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only.

[15] In *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2006] 2 CLJ 358 where at p. 374 His Lordship James Foong J (as he was then) held:

> The tort of conspiracy consists of an agreement by two or more to do an unlawful act or to do a lawful act by unlawful means - see *Clerk & Lindsell on Torts*, 17th edition at paragraph 23-76. To succeed in this cause of action three essential ingredients must be proved:
>
> (a) There must be an agreement between two or more persons;
>
> (b) The agreement must be for the purpose of injuring the plaintiff;
>
> (c) The act or acts done in execution of that agreement resulted in damage to the plaintiff-see *Lonrho Ltd. v. Fayed* [1991] All ER 303.

[16] The Court of Appeal in *SV Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd* [2008] 4 CLJ 20 held at para. 18:

> In the tort of conspiracy, there must be an agreement or combination of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means resulting in damages to the plaintiff (*Industrial Concrete Products Bhd. v. Concrete Engineering Products Bhd & Other Suits* [2001] 8 CLJ 262, *Mulcahy v. R* [1868] LR 3 HL 306 at 317 and *Belmont Finance v. Williams Furniture (No 2)* [1980] 1 All ER 393 at p. 403).

[17] In the same case at para. 22 the Court of Appeal went on and held as follows:

> Similarly, regarding conspiracy, in the absence of direct evidence, the question is whether the united effect of all those facts can provide a strong enough basis to support the inference that there must have been an agreement between the appellants or any two of them with the common intention of unlawfully interfering with

and causing damages to the respondent's business. The totality of the evidence appears to fall short of supporting the aforesaid inferences.

[18] Reverting to the plaintiffs' claim and matters in issue which this court have to decide, from the evidence it is clear that the 4th defendant is empowered by the Medical Act 1971 and the Medical Regulations 1974 to commence disciplinary inquiries into complaints made against any medical practitioner registered with it. It is a statutory body created under the Act and has its own duties and functions, which do not involve the MOH's decision to raid the centre. There is no proof to show that the MOH had consulted the 4th defendant before raiding the centre. There is nothing to show that MOH had acted in concert with MMC when they raided AMC or when the 1st plaintiff was charged at the Klang court.

[19] The calling of the 3rd defendant as a witness that represented MMC to prove that the 1st plaintiff was a registered doctor with MMC when the offence he was charged with was committed is not sufficient to show to the court that MMC was acting in collision with MOH in a conspiracy to injure the plaintiff. From the eyes of the law it is a normal procedure in prosecution when it was conducted the way it did by MOH. From the evidence it is also clear to this court that the 1st, 3rd and 4th defendants were not involved in the approval process of the licence for the plaintiffs. As to the non-issuance of the licence by the 2nd defendant it surfaces from the evidence that the plaintiffs' application did not meet the requirement of documents, he also failed to pay the processing and licence fee amounting to RM3,450 for the renewal process, and therefore did not comply with the requirements under the Atomic Energy Licensing Act 1984.

[20] As to the weight to be attached to the 1st plaintiff's evidence about certain incidents involving certain names for example about the Rector of ITM having called him to complain that the 4th defendant was pressuring ITM to drop their program and whose pressure was channelled through the 1st defendant who represented the 4th defendant at meetings held by MMC, it is incumbent upon the 1st plaintiff to produce the said Rector to testify as to the truth of the allegation. While it is understandably extremely difficult for the plaintiff to secure the attendance of the Rector to declare in court what he had told the 1st plaintiff in private (more so if told in confidence) it is still the requirement of

A the law of evidence particularly s. 103 of the Evidence Act 1950 that he who alleges must prove the allegation, which the 1st plaintiff fails to comply.

[21] At this juncture and on reflection of all the evidence available
B before this court it is clear that the plaintiffs have failed to provide direct evidence sufficient to prove an agreement by the defendants to conspire to injure them. This court cannot find any factual basis to support the inference that there was any agreement in any form between the defendants or any two of them with the
C common intention of unlawfully interfering with and causing damage to the plaintiffs medical practice, whether by way of inquiries, the raid or even the Klang court matter.

[22] All these lead to the finding of this court that the plaintiffs fail to show that the defendants were working together in an
D agreement committing an unlawful act by lawful means, or even by unlawful means in furtherance of the said conspiracy as claimed by the plaintiffs which resulted in loss and damage to them. In conclusion this court finds that the plaintiffs have failed to
E discharge their burden of proving the case.

Whether The Plaintiffs Have Pleaded Sufficiently In A Case Of This Nature

[23] The defendants submit on its principle – see *Bullen & Leake*
F *& Jacobs on 'Precedents of Pleadings'* 13th edn. at p. 221 as follows:

> Pleadings. The gist of the tort of conspiracy is not the conspiratorial agreement to injure alone, but that agreement plus the overt acts causing damage (*Marrinan v. Vibart* [1963] 1 QB 234, affirmed [1963] 1 QB 528). The statement of claim should
G describe who the several parties to the conspiracy are and their relationship with each other. It should allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued, and the intent to injure ... : there is no
H call for a general plea of "acting wrongly and maliciously" (*Sorrel v. Smith* [1952] AC 700, at 714) nor is that sufficient. It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy, and lastly, the injury and damage occasioned to the plaintiff
I thereby.

On perusal of the pleadings it is observed by this court that the plaintiffs have failed to plead sufficiently and with clarity the particular facts of the agreement by the defendants to conspire to injure the plaintiffs.

Whether The Court Should Allow The Plaintiffs' Claim That The Entire Proceeding Before The PIC Of The 4th Defendant Pertaining To The Three Complaints Against Them Be Declared Null And Void For Failure To Adhere To The Medical Regulations 1974

[24] It is specifically provided for under Part IV of the Medical Act 1971 and the Medical Regulations 1974 that the 4th defendant is empowered to commence disciplinary inquiries into complaints made against any medical practitioner registered with MMC. Section 31 of the same Act provides a statutory guarantee of the right for the aggrieved medical practitioner to appeal to the High Court against the said decision of MMC in the exercise of its disciplinary jurisdiction. In this aspect this court is of the view that it is premature at this juncture for the plaintiffs to ask for such a declaration from this court.

[25] For the above reasons and on a balance of probabilities this court finds that the plaintiffs have failed to prove their claim against the defendants. Plaintiffs' claim is therefore dismissed with no order as to cost.